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Supreme Court of the United States

OCTOBER TERM, 1939

No. 297

T. L. MORRIS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS AND SUPPORTING BRIEF

FRANK J. LOONEY,
Attorney for Petitioners.

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To the Honorable, the Justices of the Supreme Court of the United Statess

The petition of T. L. Morris, L. Hugh Morris, M. N. Morris, Z. B. Freeman and J. L. F. Beasley, with respect, shows:

I.

That petitioners together with several corporate defendants and two other individ-

uals were indicted in the Western District of Louisiana on June 21, 1937, the indictment being endorsed "A true bill:—Vio: Section 215, Penal Code—using the mails to defraud." (R-2-28).

That a jury trial was had and on July 11, 1938 a mistrial was entered because the jury could not agree on a verdict. (R78-79)

On March 13, 1939 a new trial was begun resulting in a verdict of guilty against petitioners and other defendents except the two individuals, R. C. McCoy, Jr. and H. R. O'Gwin; the verdict being returned April 1, 1939. (R104 and R44).

Demurrer and motions to quash were filed covering the issues herein raised as to the indictment, on behalf of all defendants, before the first trial, and were overruled (R28-43).

As also motion in arrest of judgment after the last trial on behalf of all defendants convicted (R44-45), and motion for new trial (R45-50).

These were overruled, whereupon defendants, after sentence, appealed (R33-67) and after legal extensions of time lodged their perfected appeals in the United States Circuit Court of Appeals, 5th Circuit on Dec. 13, 1939 (Title page) said appeal being accompanied by assignment of error and bills of exception (R109-205).

The United States Court of Appeals, 5th Circuit affirmed the judgment on June 11, 1940 (R217-233), on July 8, 1940 denied motion for rehearing (R239).

STATEMENT

1. The first count in the indictment read:

> "That before the committing of the several offenses in this indictment herein mentioned, (then follows names of defendants) * * did devise and intend to devise a scheme and artifice to defraud and to obtain money and other property by means of false and fraudulent representations, pretenses and promises from Effie M. Dyer" and others named) "and divers and sundry other persons to your grand jurors unknown, etc." (R2-3).

The 3rd paragraph in this first count read:

> "It was further a part of the said scheme and artifice to defraud that the said defendants would, on or about April 19, 1934 transfer to the said American Benefit Association x x the business of the Southern Protective Union x x and that the said defendants, as the American Benefit Association would receive all funds due the expense fund of the Southern Protective Union." (R5).

Both the American Benefit Association and the Southern Protective Union are named as defendants in the indictment and were convicted. (R44)

The 4th paragraph of the first count reads:

> It was further a part of the scheme and artifice to defraud that the said defendents would transfer to the said American Benefit Association the Louisiana Division of the National Protective Union x x x and that the said defendants as the American Protective Association, would receive the premiums due on the policies in the Louisiana Division of the National Protective Union (R5).

These allegations it was contended made the indictment duplicitous.

2. On the trial of the case a number of exceptions were taken, and errors were assigned in the Court of Appeals thereon, to evidence of transactions, not in themselves criminal, in which 3rd parties or some of the defendants and third parties were concerned, which transactions occurred after the indictment was found and in some instances after the first trial of accused.

Illustrative of this is Bill of Exception No. 18, taken when a government witness was asked whether or not on June 30, 1937,

the Gibraltar Life Insurance Company (not named in the indictment) which had issued a check to the Imperial Life Insurance Company, was not as badly impaired as it, the Gibraltar Life Insurance Company, was before the money previously borrowed from the Imperial Life Insurance Company was deposited in the bank (R145).

Another illustration is found in Bill of Exceptions No. 6, taken to a ruling of the trial court admitting in evidence a decision of the Supreme Court of Colorado rendered and made final July 12, 1937. (R-127). This case entitled International Service Union vs. People is reported 101 Colo. 1, 70 Pac. 2nd 451.

The indictment in the case on trial was found June 21, 1937, filed June 25, 1937 (R2 and 28).

3. On the trial of the case, a government witness, L. O. Taylor, Postoffice Inspector, having testified that defendant refused permission to audit the books of the American Benefit Association was asked on cross examination about making application to the District Judge for an order for audit whereupon the trial judge said:

> "That is not true in a criminal case—there was no matter pending before the court as to which the court could have ordered an audit made. Furthermore, a

defendant in a criminal case is not required to furnish evidence against himself and if he refused to let the government see his books, the government has no legal means of getting at them (R148).

JURISDICTION

The case involves questions of criminal law in which the jurisdiction of the Court of Appeals is final unless the Court subject such decision to review.

It is contended that this Court has jurisdiction to review the judgment under section 347 of Title 28 of the United States Code. See United States vs. Gulf Refining Co. 268 U. S. 542.

QUESTIONS PRESENTED

1. Can an indictment in one count charge both a scheme to defraud persons of their money and property by means of false and fraudulent representations pretenses and promises and schemes to defraud corporate entities by securing control of their funds by means other than representations pretenses and promises, without being void for duplicity?

2. Can evidence of transactions not shown to be criminal, but highly prejudical be admitted when third persons were involved in transactions or when only one or more

of defendants were participants, and when such transactions took place after the date of filing of the indictment?

3. Can a trial judge, in the presence of the jury, make a statement that the law does not permit an audit to be made of corporation books in a criminal case on order of a judge, because no accused can be made to incriminate himself, when it is material to the issue to prove that there was an act of concealment on the part of a defendant or defendants which might influence the jury in determining guilt or innocence?

I.

REASONS RELIED ON FOR GRANTING WRIT

In deciding that an indictment is not duplicitous when it charges both a scheme to defraud persons by means of false and fraudulent representations, pretenses and promises and schemes to defraud corporations by other means without resorting to such representations, pretenses and promises, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court.

In United States vs. Young 232 U. S. 155, 161-2, the court indicated the schemes were distinct.

II.

In admitting evidence of transactions which were not in themselves shown to be criminal and which took place after the indictment was filed the Court of Appeals rendered a decision in conflict with other circuit courts of appeal and especially in conflict with the decision of the Court of Appeals, 9th Circuit, McLafferty vs. United States 77 Fed. 2nd, 715 and of the 10th Circuit Coulston vs. U. S. 51 Fed. 2nd, 178 and of the 6th Circuit Court, Wilson vs. U. S. 109 Fed. 2nd 895. See also Williams vs. Great Southern Lumber Co. 277 U. S. 19, 26.

III.

In making an erroneous and prejudicial statement of the law that tended to prejudice the jury against defendant on the theory that they were concealing material evidence, which without their permission, the government could not secure and in stating, without any ground, that a corporate defendant could not be compelled to submit its books to audit in a criminal case because of the prohibition against self-incrimination, in direct conflict with an applicable decision of the Supreme Court of the United States, to-wit: Wilson vs. U. S. — 221 U. S. 361.

Petitioners, herewith present, as part of this petition, transcript of record in the Circuit Court of Appeals, 5th Circuit.

Wherefore, your petitioners respectfully pray that a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 9092, T. L. Morris et al; appellants vs. United States of America, appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Court and that your petitioners be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper—

FRANK J. LOONEY,
Attorney for Petitioners.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.